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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 114

FEDERAL TRADE COMMISSION, PETITIONER

v.

CARTER PRODUCTS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Acting Solicitor General prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit entered in the above-entitled cause on January 19, 1953.

OPINION BELOW

The opinion of the court of appeals (R. vol. V, 2–12) is reported in 201 F. 2d 446.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 1953 (R. vol. V, 12–13). A timely petition for rehearing was denied on March 13, 1953 (R. vol. V, 13–14, 31). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The Federal Trade Commission conducted protracted proceedings (47 witnesses, 10,641 pages of transcript, 2209 exhibits) in order to determine whether representations made by respondent in connection with the advertisement and sale of "Carter's Little Liver Pills", were false and deceptive. The Commission's cease and desist order, issued at the conclusion of the proceeding, prohibited a wide variety of false claims. The order of the Commission was set aside in its entirety by the court of appeals on a finding that the examiner had made five rulings which unduly restricted the scope of cross-examination of three Commission witnesses. The court refused to remand the case for further supplementary proceedings. Assuming, without conceding, that the rulings in question constituted prejudicial error, the following questions are presented:

1. Whether it was the duty of the reviewing court to remand the cause to the administrative agency for further proceedings consistent with the court's opinion.

2. Whether it was error to set aside those separate provisions of the order bearing no relation to the subject matter as to which the cross-examination was held to be unduly limited.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21,

1938, 52 Stat. 111, 15 U. S. C. 45, provides in part as follows:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.
>
> * * *
>
> (c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. * * * Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, * * *.

STATEMENT

In May 1943 the Federal Trade Commission issued a complaint under Section 5 of the Federal Trade Commission Act charging that respondent had been making numerous false representations concerning a preparation called "Carter's Little Liver Pills" which respondent sold throughout the United States, and that such conduct constituted unfair and deceptive acts and practices in interstate commerce within the meaning of Section 5 (R. 3–19).[1] In the course of extended hearings before an examiner, beginning in November 1943 and ending in November 1945, 10,641 pages of testimony were taken and 2,209 exhibits were introduced (R. 33–35). After each side had submitted, at the examiner's request, its views on the facts established by the evidence, the examiner issued a report in July 1946 (R. 32). The report contains a detailed and documented review of the evidence (R. 45–233) and the factual conclusions reached by the examiner after careful consideration of the entire record and evaluation of the various witnesses who had testified before him (R. 233–247).

Exceptions to the examiner's report and briefs were filed and the Commission heard oral argument. Two Commissioners having died and a third resigned before decision was reached, the case was reargued

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[1] The complaint was also issued against Street & Finney, respondent's advertising representative in promoting sale of Carter's Little Liver Pills (R. 3–4). The Commission dismissed the complaint as against Street & Finney, "without prejudice" to possible future action against it (R. 337).

fore the Commission after these vacancies had been filled. In March 1951 it filed its findings of fact and conclusion (R. 305–33) and issued a cease and desist order against respondent (R. 334–7).

The Commission found that, contrary to respondent's representations, its pills do not constitute an effective treatment for constipation, do not remedy or favorably influence the underlying causes of constipation, and have no therapeutic value in treatment of its symptoms [2] beyond such temporary relief as may be afforded by laxation (R. 307, 309–10, 312–3); do not represent "a fundamental principle of nature in self-treatment" (R. 311); contain "strong medicines" (R. 308, 313); [3] are not "safe for and harmless to" all individuals suffering from constipation or indigestion (R. 308, 314); are not an effective treatment for sluggish liver action, have no therapeutic effect on the liver or its disorders, and do not influence the flow of bile from the liver in such a way as to permit overeating or overindulgence without suffering the customary discomforts incident thereto (R. 308–9, 326–7).

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[2] As to symptoms, respondent advertised its pills as an effective treatment for, *inter alia*, headaches, ugly complexion, bad breath, coated tongue, bad taste in the mouth, "lazy digestion," and indigestion caused by constipation (R. 310).

[3] The Commission found that the ingredients of the pills are "irritant purgatives" (R. 313) and that one of the two ingredients, podophyllum (R. 310), had been removed from the U. S. Pharmacopoeia when the scientific group responsible for this publication recognized it to be a "drastic" drug (R. 313–4).

The Commission's order prohibits respondent from making the various representations found to be false (R. 334–7). Among the representations prohibited are that the pills represent a fundamental principle of nature in self-treatment, that they are a cure for constipation, that they do not contain strong medicines, that they are unqualifiedly safe, that they are an effective treatment for indigestion, and that constipation poisons the body (par. 1 (a), (b), (c), (d), (h), (l), R. 335–6). The order also prohibits respondent from using the word "Liver" in the trade name for its preparation (Par. 2, R. 336–7).

Respondent's petition to review the Commission's order did not question the sufficiency of the evidence or the merits of the Commission's decision (R. 1696–1701; vol. V, 2). The principal claim made was that respondent had been denied a fair hearing in that the examiner had prejudicially restricted respondent's cross-examination of certain of the Commission's expert witnesses (*ibid*). The court below ruled that there had been "unjustifiable" restrictions on cross-examination of three such witnesses, and that their "cumulative effect" had operated to deprive respondent of a fair hearing (R. vol. V, 12). The court refused to consider whether there was ample other evidence to sustain the Commission's findings and order so that the "unjustifiable" restrictions on cross-examination were not actually prejudicial (*ibid*). The opinion concludes: "The order of the Commission is set aside" (*ibid.*)

The judgment which was entered provides that the Commission's order "be, and hereby is set aside" (R. vol. V, 13). A timely petition for rehearing alleged error in failing to remand the case to the Commission to permit it to correct the errors which the court had held to be prejudicial (R. vol. V, 15–19). The petition also alleged error in setting aside the Commission's order in its entirety although the rulings which had been condemned did not affect in any respect numerous misrepresentations found by the Commission and severable parts of its order based thereon (R. vol. V, 19–21). The court denied the petition without opinion (R. vol. V, 31).

The opinion of the court of appeals does not reveal various facts which we deem relevant to the limitations on scope of cross-examination which the court held to be erroneous. The balance of the Statement will deal briefly with these rulings, since an understanding of their real character and effect serves to put into proper focus the errors which are the basis for requesting certiorari—the court's failure to remand to the Commission and its setting aside of the Commission's order in its entirety.

(1) Dr. Bollman made a statistical analysis of data recorded in certain experiments made by Dr. Morrison, an expert witness for respondent, and from this analysis concluded that the data did not show that respondent's preparation increases the flow of bile. On cross-examination, Dr. Bollman testified that he had used the same statistical method for evaluating

data appearing in some of his published articles, had used the method more frequently in evaluating unpublished data, and had not used it in two tables appearing in a particular published article (R. 1485–9). The court held (R. vol. V, 4–5) that the examiner had erred in not permitting respondent's counsel to ask whether Dr. Bollman had used the same method in each of his 165 other published articles or to ask as to his best recollection concerning this (R. 1490–2). As to whether the examiner's rulings materially prejudiced respondent, it may be material that both Dr. Bollman and Dr. Ivy, another Commission expert, testified that, for reasons not related to the former's statistical analysis, flow of bile from the liver cannot be reliably determined by the experimental method used by Dr. Morrison. See R. 153–160. Furthermore, the examiner stated in his report that he was "not at all impressed with" Dr. Morrison's sincerity, thoroughness, or professional ethics (R. 161–2).[4]

(2) Dr. Bollman performed surgical experiments on dogs, from which he concluded that constipation does not affect the secretion or flow of bile. Not only was there testimony of other doctors that constipation does not have this effect,[5] but the cross-examination of Dr. Bollman as to his experiments covers over 200 pages of the transcript (see R. 1440–83). The

[4] After the close of the hearing, Dr. Morrison filed a petition for leave to intervene and to strike and suppress all of his own testimony (R. 162–3).

[5] Dr. Ivy (R. 541, 704–5, 725); Dr. Carlson (R. 479); Dr. Palmer (R. 687–8, 696–7); Dr. Crandall (R. 1672).

court held (R. vol. V, 6) that the examiner erred in refusing to allow questions as to whether dog and man react in the same way to the stimulus of particular drugs. The ground of the examiner's ruling was that Dr. Bollman's experiments were based upon his experience and qualifications as a physiologist, and not as a pharmacologist (R. 1479–83).

(3) Dr. Lockwood testified to experiments made on a number of patients by inserting a T-tube in the common bile duct, connecting the tube with a suction pump, and in this way collecting bile passing through the duct before and after a dose of respondent's pills. The conclusion drawn from the experiments was that the pills do not increase the flow of bile.[*]

In the course of cross-examination, which covers 272 pages of the transcript, the examiner refused to permit a question as to whether the flow of bile from the liver is affected by the back pressure built up in the biliary system when the sphincter of Oddi (part of the biliary tract) closes. The question was objected to on the ground that it related to a very technical matter, outside the scope of the direct examination (R. 977). The examiner also did not permit the question whether use of a suction pump in the experiment created an abnormal condition (R. 983), but he permitted a series of questions which fully explored the

[*] Three other doctors testified that the pills do not increase the flow of bile (Dr. Palmer, R. 696; Dr. Carlson, R. 383, 386; Dr. Ivy, R. 533, 621–2). Dr. Killian, respondent's principal expert witness, also testified that the pills would increase the flow of bile only under certain specific conditions, none of which could practically be met (R. 1305–6).

question whether any departures from normal in the experiment would affect the validity of the results shown (R. 663-8). The examiner's restrictions on cross-examination were held error (R. vol. V, 9).

(4) Dr. Case conducted a series of experiments in which he took X-ray pictures of gall bladders before and after the taking of certain foods and of respondent's pills. He testified that, based on these experiments, the pills had no effect on the formation or flow of bile. When respondent on cross sought to inquire into the operation of the liver and biliary system, the examiner sustained an objection on the ground that the witness had been qualified only as a roentgenologist, and not as a gastroenterologist. Such ruling was held erroneous (R. vol. V, 11-12).[1] The disallowed questions were not as to the extent to which his experiments involved application of his experience outside of his specialized field, roentgenology, but were as to the general functioning of organs of the biliary tract (R. 651-2). The latter was outside the scope of his testimony on direct.

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

(1) In failing to remand the case to the Federal Trade Commission for additional proceedings con-

[1] The court in a footnote stated, without comment, that at a later stage of the proceedings respondent had offered to prove that Dr. Case was an interested witness because he was president of a company which sold a competing "proprietary laxative," but that the examiner rejected the offer on the ground that it came "too late" although the case was still open for the taking of evidence (R. vol. v, 12).

sistent with the court's opinion, and in holding, in effect, that a proceeding *de novo* would be required preliminary to the entry of a valid cease and desist order.

(2) In setting aside the entire order notwithstanding the fact that various severable provisions of the order, including subparagraphs a, b, c, d, h and l of paragraph 1, were entirely unaffected by the evidentiary rulings held to be erroneous.

(3) In holding that various rulings of the examiner limiting cross-examination were erroneous and prejudicial.

(4) In failing to affirm the order of the Commission.

REASONS FOR GRANTING THE WRIT

1. The administrative proceedings which gave rise to the instant litigation involved an intensive and protracted hearing on a matter peculiarly affected with a public interest. Protection of the public from false and deceptive representations made in promoting sale of a widely distributed medical preparation.[1] The proceedings culminated in a cease and desist order (R. 334) prohibiting respondent from making fifteen distinct types of advertising claims and requiring, additionally, disuse of the term "Liver" in the product name.

Respondent, in seeking review in the court of

[1] Paragraph four of the Commission's findings (not questioned by respondent) setting forth its representations to the public (R. 307–10) shows the many extravagant claims which it has made, substantially all of which the Commission found to be false (*supra*, p. 5).

appeals, did not challenge the sufficiency of the evidence, the adequacy of the findings, or the merits of the Commission's decision (R. 1696–1701; vol. V, 2). Its attack was confined to certain rulings of the examiner restricting the scope of the cross-examination of four Commission witnesses, as to three of whom the court said the rulings "tended to be insufferably technical where not wholly erroneous" (R. vol. V, 4). The court, finding cumulative error in these rulings, set aside the Commission's order in its entirety. By thus terminating the proceeding, and by subsequently denying the Commission's petition for rehearing, which requested that the proceeding be remanded, the court has made it necessary for the Commission, if it is to go forward, to begin all over again. This means that the Commission must discard not only the entire testimony of the three witnesses whose cross-examination was limited, but also all other evidence presented in the proceeding, including the testimony of 44 other witnesses (R. 35), and that separate provisions of the order which in nowise relate to the issues as to which there was held to be "unjustifiable" restrictions of cross-examination must fall.

Assuming, *arguendo*, that the challenged rulings of the examiner constituted prejudicial error, we believe that it was the duty of the court to remand the case to the agency so as to permit correction of the errors by further proceedings. As we shall show, the failure to remand for this purpose conflicts with principles established by numerous decisions of this Court and of other courts of appeals.

In addition, we submit that it was error to set aside the order in its entirety, since various prohibitory provisions of the order have no relation to the testimony as to which cross-examination was held to have been unduly limited. On this aspect of the case the decision below likewise conflicts with well-established principles of federal practice governing review of administrative orders.

Indisputably, both of the questions raised in the preceding two paragraphs are of substantial and general importance. The view taken by the court below, if it should prevail, will have a serious impact upon the orderly and expeditious consummation of administrative proceedings. Its implications are far-reaching, not only from the standpoint of the Federal Trade Commission, but from the standpoint of all federal regulatory agencies whose proceedings are subject to review in the courts.*

2. The purpose of judicial review of administrative

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* We have also specified as error, but shall not urge as a ground for grant of certiorari, the holding of the court below that the rulings restricting cross-examination were erroneous and prejudicial. In a hearing of the length and complexity of the present one, and marked by extended cross-examination, we submit that the examiner did not exceed the considerable discretion vested in the hearing officer as to the scope of cross-examination; that the limitations found to be objectionable involved exploration of matters which, in the over-all picture, were relatively trivial; that respondent was afforded full and fair opportunity to present its defense; and that respondent was not materially prejudiced by the rulings which the court below condemned. See facts previously stated as to circumstances pertinent to these rulings, *supra*, pp. 7–10.

orders is to permit an effective settlement of legal disputes with "a minimum of technical requirements." *Ford Motor Company* v. *National Labor Relations Board*, 305 U. S. 364, 373. "The function of the reviewing court ends when an error of law is laid bare." *Federal Power Commission* v. *Idaho Power Company*, 344 U. S. 17, 20. "An administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145. Accordingly, in instances when a reviewing court has found prejudicial error in proceedings underlying an administrative order, the settled practice has been to set aside the order (or the affected portion of it) and to remand the cause to the administrative agency to permit correction of the error through further proceedings.*

This course has been followed when a fair hearing has been denied by failure to afford interested parties opportunity to present argument to the administrative official or agency clothed with power of decision (*Morgan* v. *United States*, 304 U. S. 1, 20; *United States* v. *Morgan*, 313 U. S. 409, 414–416; *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 373–6); when material evidence has been erroneously excluded (*National Labor Relations Board* v. *Don-*

*For recent examples see *Federal Communications Commission* v. *ECA*, No. 567, this Term, and *Automatic Canteen Co.* v. *Federal Trade Commission*, No. 89, this Term, decided June 8, 1953.

nelly Garment Co., 330 U. S. 219, 224–6); and when there has been prejudicial limitation of cross-examination (*Reilly* v. *Pinkus*, 338 U. S. 269, 277; *Fresh Grown Preserve Corporation* v. *Federal Trade Commission*, 125 F. 2d 917, 920 (C. A. 2); *idem.*, 139 F. 2d 200; *Shaw* v. *Duncan*, 194 F. 2d 779, 783 (C. A. 10); *Southern Stevedoring Co.* v. *Voris*, 190 F. 2d 275, 278 (C. A. 5).[*] This Court has also recognized that, in the absence of compelling reasons to the contrary, reviewing courts should remand, for further consideration by the agency, undecided or improperly decided questions involving the sufficiency of evidence or the interpretation of evidence. *Federal Trade Commission* v. *Curtis Publishing Company*, 260 U. S. 568, 580.

Likewise, an administrative body, after its order has been set aside because of failure to make essential subsidiary findings, may reopen the proceeding and enter a valid new order based upon the reopened proceeding. *Florida* v. *United States*, 282 U. S. 194, 212; *idem.*, 292 U. S. 1, 3-4. And the court's statutory authority to "modify" an administrative order does not permit exercise of "an essentially administrative function"; if this kind of a change in the

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[*] *Pocahontas Mining Co.* v. *Isbell*, 118 F. 2d 105, 110 (C. A. 6), reversed an administrative order upon the ground of erroneous denial of rights of cross-examination, and remanded the case for "rehearing in accordance with this opinion." It is not clear from the opinion, however, whether the court was of the view that a hearing *de novo* would be necessary. See, in this connection, *National Labor Relations Board* v. *Donnelly Garment Company*, 330 U. S. at 228.

order is required, there must be a remand to the administrative body for reconsideration. *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. 17, 20–1; *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 55.

Closely in point are *Reilly* v. *Pinkus*, 338 U. S. 269, and *National Labor Relations Board* v. *Donnelly Garment Company*, 330 U. S. 219. In the *Reilly* case, this Court found that there had been improper limitation of cross-examination, as in the case at bar. This Court's order, however, differed from that entered by the court below in the instant case, in that the Court stated (p. 277) that it affirmed the judgment enjoining the Postmaster General's fraud order "without prejudice to a *reopening* of the proceedings against respondent to permit *additional* hearings * * *." (Italics supplied.) This clearly permitted a reopening of the prior proceeding for the correction of the erroneous evidentiary ruling. In the *Donnelly* case, the court of appeals originally held that a fair hearing had not taken place because certain evidence had been improperly excluded (see 330 U. S. at 224). On remand, the Board reopened the proceeding and received the previously excluded evidence. It rejected additional evidence available at the time of the first hearing but not proffered on that occasion. On the basis of the two hearings, it entered a new order. *Ibid.* On appeal from the revised order, the court of appeals took the view that a full new hearing should have been held by the Board (330 U. S. at 227). This Court held to the

contrary, noting (p. 228) that "there appear[ed] only a very restricted dissatisfaction with the original proceeding before this Board, calling for a correspondingly restricted correction." The Court stated emphatically (*ibid.*):

> Due process does not afford a party the right to treat as a rehearsal a hearing on the issues for which the hearing was adequate. And the Wagner Act does not require that ground be covered a second time or piecemeal.

Similarly, in *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, 373–374, this Court held that limited, additional administrative proceedings would suffice to cure the defect rendering the Board's original proceeding unfair. And this Court and courts of appeals in other circuits have so held when the defect found by the reviewing court was prejudicial limitation of cross-examination. See cases cited *supra*, pp. 14–15.

The decision below conflicts with these cases which recognize that the relationship between the reviewing court and the administrative body is complementary. *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U. S. 134, 144, 145. The court goes no further, in the ordinary situation, than is necessary to establish the error in the agency's proceeding. Once this is established, the matter is referred back to the agency to permit correction in the light of the Court's opinion.

Concededly there are situations in which the error is so pervasive in its nature that it infects the entire

record. The most familiar example is the case where a court finds, upon examination of an administrative transcript, clear and convincing indications of bias and prejudice on the part of the examiner, and consequent denial of the essentials of due process at the hearing. *See National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 337 U. S. 656, 659–60; *National Labor Relations Board* v. *Houston & North Texas Motor Freight Lines, Inc.*, 193 F. 2d 394, 397 (C. A. 5); *Montgomery Ward & Co.* v. *National Labor Relations Board*, 106 F. 2d 147, 156–7 (C. A. 8). That, plainly, is not this case.

In a record of many thousands of pages, the court found five instances in which particular, relatively narrow, rulings on the scope of cross-examination were unduly restrictive. Respondent's counsel in the Commission hearing declared that the examiner had been "most considerate" and "patient and generous" in granting respondent three opportunities to get certain proof in evidence (R. 1075–6).* Respondent's chief expert witness and its counsel each expressed appreciation for the courtesies extended to him by the examiner (R. 1268, 1679).** While the court below concluded that certain evidentiary rulings had the effect of making the hearing unfair to respondent, it did not hold or intimate that the examiner was biased or prejudiced.

* The examiner allowed respondent's counsel a fourth opportunity to cure the defects in his proof (R. 1077).

** As to further statements by respondent's counsel attesting to the fair spirit in which the hearing had been conducted, see R. 1268, 1295, 1675.

The principle of the decisions which we have heretofore cited has clear application here. There seems little doubt but that an additional hearing, permitting proper cross-examination, followed by reconsideration on the part of the Commission, would be sufficient to overcome the errors found by the reviewing court.[5] To require the destruction of a proceeding of some ten years duration, including two years of actual hearings, because of limited restrictions upon the right of cross-examination, constitutes, we believe, an unwarranted and seriously damaging interference with the administrative function. The practical effect of the holding is to grant an immunity from the prohibitions of the Federal Trade Commission Act until an identical proceeding can be tried and administratively determined *de novo* and reviewed again by the courts.

3. There was independent error in that the court below foreclosed the Commission from giving effect to provisions of the order which bear no relation to the issues respecting which cross-examination was

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[5] While there has been a considerable lapse of time since the evidence was taken, counsel for Carter and its consulting medical experts are thoroughly familiar with all aspects of the case and can readily pick up the threads in conducting, in a reopened proceeding, the cross-examination originally barred. The Commission can permit introduction of any additional evidence which becomes appropriate by reason of facts developed on such cross-examination. Although one of the witnesses involved (Dr. Lockwood) has died, the error, if any, arising from limitation of his cross-examination can be cured by striking out all of his testimony and all of the exhibits introduced through such testimony.

limited by the challenged rulings. The limitation concerned evidence directed to the effects of respondent's pills on the flow of bile and the functioning of the liver (see *supra*, pp. 7–10). Of the fifteen prohibitions contained in paragraph 1 of the order (R. 334–7), at least six are in no way dependent upon the matters as to which cross-examination was thus limited. Among the representations thus prohibited by subparagraphs of paragraph 1 are (a) that the pills are a fundamental principle in self-treatment, (b) that they are a cure for constipation, (c) that they do not contain strong medicines, (d) that they are unqualifiedly safe, (h) that they promote the proper flow of the gastric juices, and (l) that constipation poisons the body.

Certainly a proceeding *de novo* should not be required with respect to those portions of the order untainted by the alleged errors of the examiner. Cf. *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. at 373–374. This is given added point by reference to decisions concerning the appropriate method of correcting errors occurring in the course of judicial hearings. In *Yates* v. *Dann*, 11 F. R. D. 390, 392–3 (D. Del.), the court stated that Civil Rule 59 (motions for new trial) "was intended to prevent the retrial of any issue already properly decided, and to limit any new trial only to those issues which are incorrectly decided or not decided at all. Since the adoption of the Federal Rules of Civil Procedure, courts have indicated a trend to limiting

retrials to specific issues whenever possible * * *."[11] See also *Ecker* v. *Potts*, 112 F. 2d 551, 553 (C. A. D. C.); *United States* v. *Calsey*, 110 F. 2d 327, 331 (C. A. 3). The *Yates*, *Ecker* and *Calsey* cases involved the problem of correcting errors which had taken place during the course of a jury trial. If the policy of avoiding unnecessary retrial of severable issues is to be applied in the context of jury proceedings, *a fortiori* the same guiding principle applies to judicial review of an order entered in an administrative proceeding which, by its very nature and purpose, admits of considerable flexibility. Striking down an entire order because of a holding that certain portions of the order require excision or modification clearly seems to be an unwarranted extension of the power to review vested in the courts.

If the court below believed that there was some difficulty in drawing a line between the tainted and untainted portions of the order, it should have directed the Commission to fashion a modified order. Cf. *Federal Power Commission* v. *Idaho Power Co.*, 344 U. S. at 20.

CONCLUSION

The decision below is in conflict with principles established in applicable decisions of this Court and other courts of appeals, and involves important

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[11] Cf. Judge Frank's opinion in *Krests* v. *United States*, 158 F. 2d 575, 580 (C. A. 2) (remand to a trial judge sitting in admiralty).

questions of federal law. It is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted.

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JUNE 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1953